SUPREME COURT, U.S.
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No. 97-57

In The

Supreme Court of the United States

October Term, 1996

DELOS M. PALMER, JR.,

Petitioner,

v.

RICHARD G. LaVALLEY and
GERARD ASSOCIATES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner Delos M. Palmer's ("Palmer") diversity case arises out of claims of misappropriation of corporate opportunities and attorney malpractice. At trial, Palmer only offered proof of injury to Fox Research, Inc., a corporation in which Palmer had invested and served as a director. The Sixth Circuit reviewed whether Palmer had proved an injury to himself, separate and distinct from injury to Fox Research as required by Ohio law. It concluded that Palmer's claims were derivative from Fox Research rather than direct, personal claims of his own. The Sixth Circuit reversed and entered judgment for respondents (collectively "LaValley") because Palmer did not prove a separate and distinct injury, and his derivative claims had been dismissed on summary judgment which he had not appealed.

Palmer had been a lifelong Ohio resident before moving to Florida a few years before filing suit. (Tr. 819-25.) Instead of filing this suit in state court, he invoked the diversity jurisdiction of the federal court. Before the case was briefed on appeal, LaValley moved for certification; Palmer successfully opposed that motion. After the Sixth Circuit reversed, Palmer sought reconsideration and rehearing *en banc*. In a single paragraph, buried in the middle of his brief, Palmer suggested certification for the first time.

The Statement in Palmer's Petition mischaracterizes the origin of the software products underlying his claims. The FoxBASE software products at issue in this case were clones, or work-alikes, of "dBASE" software products sold by Ashton-Tate, Inc. (Tr. 643.) Palmer also misstates

the background of his investment in Fox Research. The Fox Research offering circular explained that investors were only investing in a passive tax-shelter company, Fox Research, and that a different company, Fox Software, would be set up to market the FoxBASE software. (Ex. 1-1, p. 3.) The offering circular also explained that LaValley would be counsel to Fox Research. (*Id.*) Finally, all prospective Fox Research investors were told to seek independent tax advice in the offering circular – informing Palmer that even though LaValley was a tax attorney and had served as tax counsel to Palmer's company, Palmer needed to obtain separate advice on this investment. (Ex. 1-1, p. 15; Tr. 833.)

When Microsoft acquired Fox Software in 1992, six of the seven Fox Research shareholders voted to license all of Fox Research's rights to Microsoft. (Ex. 1-40.) Palmer was the lone holdout. Knowing Microsoft would acquire Fox Software on June 25, 1992, Palmer filed this suit on June 23, 1992 alleging (i) misappropriation of corporate opportunities, claiming that the FoxBASE clones were corporate opportunities of Fox Research, and (ii) attorney malpractice by LaValley and Richard G. LaValley, Jr. (Verified Complaint.) Palmer sued Fox Software, Fox Holdings (a company related to Fox Software), Richard G. LaValley, Gerard (a management company of Richard G. LaValley's), David Fulton (Richard G. LaValley's partner in Fox Software and the principal author of the FoxBASE software), Fulton Associates (a personal operating company of Fulton's), and Richard G. LaValley, Jr. in the U.S. District Court for the Northern District of Ohio in Toledo, Ohio – intentionally avoiding the Ohio state court system.

Although the district court (Potter, J.) granted summary judgment and dismissed all derivative claims on October 1, 1992, the court (Zatkoff, J.) refused to instruct the jury that Palmer was required to prove personal injury separate and distinct from any injury to Fox Research. The jury returned a verdict for Palmer's one-seventh share of the injury Palmer claimed Fox Research suffered. LaValley and Gerard appealed.[1] Palmer appealed the district court's denial of punitive damages and attorney fees, but did not appeal the dismissal of his derivative claims. The Sixth Circuit reversed because Palmer offered evidence only of injury to Fox Research, and failed to offer any proof of personal injury separate and distinct from the alleged Fox Research injury.

REASONS FOR DENYING THE PETITION

Although this Court has repeatedly endorsed certification of questions of state law to high state courts for a decision, it has entrusted the use of certification in a given case to "the sound discretion of the federal court." *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974). Last Term, in *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997), this Court again endorsed the discretionary standard.

The Sixth Circuit exercised its discretion not to certify questions of Ohio law based upon the request of

[1] Fulton had settled during trial, and Palmer had dismissed his claims against Fulton Associates, Fox Software, and Fox Holdings. The jury had found in favor of LaValley, Jr.

Palmer, who initially chose a federal forum, who opposed certification when requested by LaValley, and who only requested certification after the Sixth Circuit ruled against him. The allegedly "novel and unsettled questions" Palmer proposed to certify are not unsettled or undecided questions of law, but are ones the Sixth Circuit properly addressed and answered based on the facts of the case and established Ohio precedent.

I. THERE IS NO SPLIT IN THE CIRCUITS REGARDING CERTIFICATION

As Justice Rehnquist explained in his *Lehman Brothers* concurrence:

> [I]n a purely diversity case such as this one, the use of [certification] is more a question of the considerable discretion of the federal court in going about the decisionmaking process than it is a question of choice trenching upon the fundamentals of our federal-state jurisprudence.
>
> 416 U.S. at 394.

There is no conflict among the circuits in respect of the exercise of that discretion in the circumstances presented here. First, no circuit would certify where, as the Sixth Circuit found here, the path to decision is clear on the facts under the applicable state law. Second, the circuits uniformly disapprove of certification when, as here, the party requesting certification invoked federal diversity jurisdiction. *Nieves v. University of Puerto Rico*, 7 F.3d 270, 278 (1st Cir. 1993) (One who chooses to litigate in federal court ordinarily must accept the federal court's

reasonable interpretation of state law and has no entitlement to certification).[2]

Third, the circuits agree that certification is generally inappropriate when, as here, the party requesting certification waits until after an adverse federal court result to request certification to the state court.

> The practice of requesting certification after an adverse judgment has been entered should be discouraged. Otherwise, the initial federal court decision will be nothing but a gamble with certification sought only after an adverse decision. Once a question is submitted for decision in the district court, the parties should be bound by the outcome unless other grounds for reversal are present.
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> *Perkins v. Clark Equip. Co.*, 823 F.2d 207, 210 (8th Cir. 1987); *See also Complaint of McLinn*, 744 F.2d 677, 681 (9th Cir. 1984) (parties should not be allowed a "second chance at victory"); *Harris v. Karri-On Campers, Inc.*, 640 F.2d 65, 68 (7th Cir. 1981) (certification after case is tried would only prolong litigation); 17A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 4248 (Supp. 1997).

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[2] *Accord, National Bank of Washington v. Pearson*, 863 F.2d 322, 327 (4th Cir. 1988); *Jefferson v. Lead Industries Assn., Inc.*, 106 F.3d 1245, 1248 (5th Cir. 1997); *Chang v. Michiana Telecasting Corp.*, 900 F.2d 1085, 1088 (7th Cir. 1990); *Harvey E. Yates Co. v. Powell*, 98 F.3d 1222, 1229 n.6 (10th Cir. 1996); *Seaboard Surety Co. v. Garrison, Webb & Stanaland, P.A.*, 823 F.2d 434, 438 (11th Cir. 1987); *Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 426 (D.C. Cir. 1988); *Joseph v. Pima County*, 158 Ariz. 250, 251, 762 P.2d 537, 538; 17A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 4248 at 176 (2d ed. 1988).

Palmer fails to cite any circuit court opinion, commentary, or state court opinion to support his contention that there is a meaningful conflict among the circuits. There is not. To the contrary, the variety in the federal courts' approaches to certification is a result of the varied factors a court must consider:

> [F]ederal courts have denied requests for certification when the status of state law on the particular point was not in sufficient doubt to justify use of the procedure, when the state law issue was not sufficiently important to the resolution of the federal action, when the request for certification was delayed unreasonably, when the matter in question could have been decided under or was governed by federal law, when the issue for which certification was sought was highly fact-dependent, when the federal court felt that use of the certification procedure would place too heavy a burden on the state judicial system, when the party seeking the certification was the party who had invoked federal jurisdiction either originally or by way of removal, when the federal court simply felt that certification would not save time, energy, or resources (perhaps because the action involved only a modest amount of money), and for a number of other reasons.
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> 19 WRIGHT, MILLER & COOPER, *supra*, § 4507 (1996) (footnotes omitted).

Some of the differences in the federal courts' approaches to certification can also be traced to variations among the state procedures. A flexible federal procedure, anchored by judicial discretion, is required to accommodate present, and unknown future, variations in

state laws, rules, and procedures. A brief overview of differing state practices illustrates the necessity to maintain the current flexible, discretionary standard.

Arizona: discourages removal defendants from certifying state law questions and believes federal courts should typically remand the state law issues rather than certify. *Joseph v. Pima County*, 158 Ariz. 250, 251, 762 P.2d 537, 538 (1988).

Delaware: adopted a constitutional amendment in 1983 limiting the Delaware Supreme Court to questions "by other Delaware courts and the United States District Court for the District of Delaware." *FDIC v. Blue Rock Shopping Center, Inc.*, 599 F. Supp. 684, 687 (D. Del. 1984).

Georgia: will not answer a certified question it considers "anticipatory." *National Gypsum Co. v. Wammock*, 256 Ga. 803, 805, 353 S.E.2d 809, 811 (1987).

Massachusetts: certification is not appropriate if the factual record is not sufficiently developed. *Lumbermens Mut. Casualty Co. v. Belleville Indus., Inc.*, 407 Mass. 675, 687, 555 N.E.2d 568, 576 (1990).

Missouri: although Missouri court rules allow federal courts to certify questions, the Supreme Court does not have constitutional authority to respond to the questions. *Grantham v. Missouri Dept. of Corrections*, No. 72576, 1990 WL 602159 (Mo. July 13, 1990).

Oregon: prefers that a case certified by a federal district court have progressed at least to the entry of a pretrial order before certification is sought. *Western Helicopter Servs., Inc. v. Rogerson Aircraft Corp.*, 311 Or. 361, 370, 811 P.2d 627, 633 (1991).

Wyoming: has held that it will not answer a certified question until there is nothing left for the federal court to do but apply the state court's answer to the question and enter judgment consistent with the answer. *In re Certified Question*, 549 P.2d 1310, 1311 (Wyo. 1976).

The current discretionary standard should remain unchanged because it permits the federal courts to weigh the various factors attending certification in a given case. Moreover, Palmer's suggestion of national uniformity can only be realized if the states adopt the same standards and procedures. The existing discretionary standard applied by the circuits under *Lehman Brothers* works and has not produced any meaningful conflict among the circuits.

II. PALMER'S CASE IS "THE ORDINARY GRIST OF THE DIVERSITY MILL" HE ADMITS IS HANDLED ROUTINELY BY THE FEDERAL COURTS

Palmer does not suggest the Sixth Circuit abused the certification discretion accorded under *Arizonans for Official English* and *Lehman Brothers*, or engrafted a new condition as rejected in *Arizonans for Official English*. Indeed, Palmer does not suggest that the Sixth Circuit failed in any way to follow these controlling cases.

Palmer nonetheless argues that the Sixth Circuit was required to submit his case to the Ohio Supreme Court. Although no Ohio case had addressed facts identical to those in Palmer's case, the questions he sought to have certified raised no "[n]ovel, unsettled question of state law." *Arizonans for Official English*, 117 S. Ct. at 1074. To the contrary, Palmer's case is "the ordinary grist of the

diversity mill [Palmer admits] poses no great difficulty for federal courts." Petition at 7. The situation here is aptly described in *Lehman Brothers*:

> If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used.
>
> 416 U.S. at 395 (Rehnquist, J., concurring).

For these very reasons, the Sixth Circuit did not certify a question, but instead resolved the state law questions "with available research materials already at hand." *Id.* Palmer agrees in principle that, "[e]ven where the highest court of a state has not addressed an issue, a federal court often will find a clear path to its decision by examining other relevant sources of state law . . . . " Petition at 7. Palmer ignores the clear path followed – and fully explained – by the Sixth Circuit, arguing instead that certification was required solely because the Ohio Supreme Court had not decided a case with the exact facts of his case.

Palmer considered his case "the ordinary grist of the diversity mill" with a "clear path to decision" when he chose the federal forum, and again when he opposed LaValley's motion for certification. His belated change of heart was properly rejected by the Sixth Circuit when raised in his motion for reconsideration *en banc*, after he lost. As Justice Rehnquist wrote in *Lehman Brothers*:

> The question of whether certification on the facts of this case, particularly in view of the

> lateness of its suggestion by petitioners, would have advanced the goal of correctly disposing of this litigation on the state law issue is one which I would leave, and I understand that the Court would leave, to the sound judgment of the court making the initial choice.
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> 416 U.S. at 395 (Rehnquist, J., concurring).

III. CERTIFICATION IN THIS CASE IS INAPPROPRIATE BECAUSE PALMER INVOKED DIVERSITY JURISDICTION, OPPOSED CERTIFICATION AT THE OUTSET OF THE APPEAL, AND REQUESTED CERTIFICATION ONLY AFTER LOSING

That Palmer, a life-long Ohio resident, invoked diversity jurisdiction rather than file in Ohio state court is a strong factor weighing against certification according to all circuit courts that have addressed the issue.[3]

Furthermore, in this case, LaValley sought certification by motion in the Sixth Circuit before the case was briefed on the merits.[4] Palmer opposed LaValley's motion

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[3] *See* cases cited at footnote 2, *supra*.

[4] LaValley sought confirmation through certification that Palmer had to prove a separate and distinct injury to himself to prevail even if LaValley had been a controlling shareholder. LaValley's proposed question read:

> Must a shareholder in a closely held Ohio corporation, suing in an individual capacity as opposed to a derivative suit, prove a separate and distinct injury to himself to obtain relief from a controlling shareholder for taking a corporate opportunity?

for certification arguing, *inter alia*, "Ohio law is clear . . . . " Palmer's Memorandum in Opposition to LaValley's Motion to Certify a Question to the Ohio Supreme Court at 13 (filed October 25, 1994).[5] The Sixth Circuit denied LaValley's motion:

> On review of the motion, the response in opposition, and the reply in support, we cannot conclude that certification of the question of law is necessary to save judicial resources or to resolve the appeals before this court. However, the panel which is assigned this appeal for final disposition on the merits may view the matter differently after reviewing the record and briefs.
>
> Therefore, it is **ORDERED** that the motion to certify the question of law is referred to the

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Appellants' Motion For Certification Of A Question To The Supreme Court Of Ohio And To Stay Appeal Calendar at 1 (filed October 17, 1994).

Palmer asserts, for the first time and without citing authority, that LaValley's proposed certified question was somehow an admission that LaValley was a "controlling shareholder" of Fox Research. (Petition at 5, n. 2.) To the contrary, as LaValley contended and the Sixth Circuit explained, LaValley was not "a majority or controlling shareholder at all." (Petition, App. A at 11a-12a.) Palmer does not ask this Court to reverse that conclusion.

[5] In his opposition, contrary to his argument in this Court, Palmer did not urge certification of an alternative question. Instead, after arguing myriad grounds for denying certification, Palmer, in passing, said, "[a] more appropriate question (dispositive at least of the Counts I and II issues), if certification were needed at all, would be whether the instruction given was a correct statement of Ohio law." Palmer's Memorandum, *supra*, at 14.

> panel that will decide this case on the merits. The request for a stay is denied.
>
> Order, December 15, 1994, Petition, App. C at 19a.

After he lost on the merits, Palmer filed a motion for reconsideration in the Sixth Circuit including for the first time a request for certification. Neither question proposed by Palmer can affect the outcome of this case.[6] Neither question can change the factual underpinnings of the Sixth Circuit opinion that (i) "[t]he actions of which Palmer complains were not the actions of a majority or

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[6] The questions Palmer asked the Sixth Circuit to certify are:

> 1. Is a client who is a minority shareholder in a closely held corporation of Ohio entitled to recover in an individual or direct action against his personal lawyer, who is a dominant officer, director, and minority shareholder of and attorney to that corporation, his damages for the diminution in value of his investment in that corporation caused by the lawyer's breach of his attorney duties to the client?
> 2. Is a minority shareholder in a closely held corporation of Ohio entitled to bring an individual or direct action to collect the amount of diminution in value of his investment caused by a dominant and controlling officer, director, and minority shareholder, where each of the other shareholders individually settled his claims against that dominant and controlling officer, director, and shareholder prior to his filing suit?
>
> Palmer's Petition for Reconsideration of the Panel Decision, Suggestion for Rehearing *EN BANC*, and Motion for Certification of Questions to the Ohio Supreme Court at 7 (filed March 5, 1997).

controlling shareholder at all" and (ii) "neither did the action complained of injure Palmer in a way that was separate and distinct from the injury to the corporation." Petition, App. A at 11a-12a. Finally, the Sixth Circuit reviewed "the record to determine whether Palmer presented sufficient evidence of attorney malpractice resulting in injury peculiar to him to sustain the jury's verdict." Petition, App. A at 13a. He had not. Petition, App. A at 14a.

There was no basis for certification in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

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